

NH-932

DOCKET NO. NHH-CV-18-6008208 : SUPERIOR COURT
A.C. NO: 42622 :
TAOM HERITAGE NEW HAVEN LLC : J. D. OF NEW HAVEN
v. : HOUSING
FUUN HOUSE PRODUCTIONS LLC, : MARCH 25, 2019
ET AL.

MEMORANDUM OF DECISION

INTRODUCTION:

This action arises out of a disagreement concerning a lease for a premises located at 85 St John Street, New Haven, Connecticut. This summary process action was brought in a three count complaint. The first count alleges lapse of time as to both defendants. The second count alleges that the defendants' right to occupy the premises has been terminated. The third count alleges that defendant, Peter Forchetti, never had a right to occupy the premises. The answer responds to the complaint's allegations and asserts three special defenses. The first and second special defenses assert that the lease term was extended and the lease remains in place. The third special defense asserts that certain actions allegedly taken by the landlord concerning parking on the premises were inequitable and as such, the court should not evict the defendants. Trial was held and judgment entered for the plaintiff.

Notice sent: March 25, 2019
Hon. John L. Cordani
Counsel of Record
Clerk, Superior Court, NHH CV18-6008208-S

12-2-11

PROCEDURAL HISTORY:

The plaintiff commenced the instant action on August 13, 2018. The defendants have been represented throughout. A bench trial was held on January 29, 2019. The court reported its decision in a written memorandum of decision dated February 14, 2019 in which the court made numerous specific factual findings based on the evidence and entered judgments. The defendants have appealed the court's judgment. The plaintiff has filed a motion pursuant to Practice Book section 61-11(d) and Conn. Gen. Stat. 47a-35(b) to terminate the appellate stay. The defendants have objected. The defendants have filed a motion for use and occupancy payments in lieu of bond. The plaintiff has objected and requested that an appeal bond be set. The court held a hearing on March 21, 2019 concerning the foregoing motions.

ANALYSIS:

This court is first asked to decide the plaintiff's motion to terminate the automatic stay of execution which has arisen because of this defendant's appeal. The plaintiff has filed its motion pursuant to the provisions of Practice Book § 61-11 and Conn. Gen. Stat. 47a-35. In accordance with the provisions of the Practice Book, the court has duly held a hearing on the plaintiff's motion.

Pursuant to the relevant provisions of Practice Book § 61-11, the court may terminate the automatic stay which arises upon appeal if the court finds that (1) the appeal was filed only for the purposes of delay, or (2) due administration of justice requires it. See *Connecticut National*

Bank v. Zuckerman, 31 Conn. App. 440, 624 A.2d 1163 (1993). In considering the foregoing two predicates, the court is to consider the following factors:

- (1) The likelihood that the appellant will prevail in the appeal;
- (2) Any irreparable injury that may arise from executing the judgment;
- (3) The effect of the stay upon other parties; and
- (4) The public interest involved.

Griffin Hospital v. Commission on Hospitals & Health Care, 196 Conn. 451, 458-60, 493 A.2d 229 (1985).

In its brief, the plaintiff makes three primary arguments for termination of the stay. First the plaintiff argues that the defendants engaged in dilatory pleadings and related actions prior to the bench trial. This court agrees with the plaintiff's contention in this regard. The serial pleadings made by the defendants before filing their answer can best be characterized a dilatory since the defendant's pleadings lacked substance, had a very low probability of success, and were repeatedly filed. However, it must be noted that the pleadings generally complied with appropriate procedure. Further, the defendants filed a last minute petition for bankruptcy which delayed trial, but as to which the bankruptcy court quickly lifted the bankruptcy stay. As noted, this court finds that the defendant's actions prior to trial, taken as a whole, are best characterized as dilatory. However, this is not a sufficient reason for the court to conclude that the appeal is brought solely for the purposes of delay.

Secondly, the plaintiff argues that the court's factual findings are subject to attack only if the appeals court finds that they are clearly erroneous in that there is no evidence in the record to support them. The appeals court will not weigh the evidence, but will instead determine whether or not there is some evidentiary support in the record to support the factual findings. This is a correct statement of the law in this court's view. Although the standard of review for factual findings presents an obstacle to the defendants on appeal, it does not necessarily mean that any appeal of such is taken solely for purposes of delay.

Lastly, the plaintiff argues in the abstract that there are no conceivable bona fide issues to appeal that have any likelihood of success. The plaintiff concludes this based upon its view of the centrality of the trial court's factual findings and the difficulty of challenging them on appeal, as well as the plaintiff's confidence in the court's legal conclusions. However, as noted, the plaintiff here is arguing in the abstract since the defendants have not yet filed any appeal brief.

This court finds it difficult to assess the defendants' likelihood of success on appeal since the plaintiff has made its arguments in the abstract and the defendants have not yet filed appeal briefs. This court has reviewed the defendant's list of preliminary appeal issues, which are many. Given the foregoing, although this court firmly believes that the trial and its judgments were appropriate, this court cannot reliably assess the defendants' likelihood of success on appeal at this point in the process and on this record.

In considering irreparable injury, the court notes that this matter concerns a commercial lease wherein the defendant has been operating a business on the premises since 2002. The

defendant's business remains in operation at the premises. An eviction can be expected to interrupt the business. On the other hand, the plaintiff, the owner of the premises, has substantial imminent plans for the property to build residential units there. The defendants' continued presence on the property is interfering with the plaintiff's ability to proceed with and finance its plans. Thus irreparable injury potentially exists on both sides.

This matter does impact parties other than the litigants, primarily the public and the city of New Haven. Specifically, the plaintiff intends to further develop the property and build residential living units on the property. This will benefit the public and the city of New Haven through access to affordable housing, improved infrastructure and improved tax revenues. It also presents the possibility of improving the neighborhood.

The public interest here is divided. The public has an interest in quick certain dispositions of summary process matters. This court has strived in this matter to achieve that goal despite the initial delays which arose as a result of the defendants' actions. However, the public also has an interest in preserving a party's right to appeal. This right to appeal is fundamental to our system of justice and arises out of the humble and certain recognition that even with the best of intentions and human skill, mistakes can be made. When weighing these two interests, only in the most unusual and certain cases does the first interest outweigh the second.

The court does not believe that it should conclude that the appeal was taken solely for the purposes of delay unless it can conclude that the appeal is objectively baseless. In this regard, the court notes that the rule uses the word, "only". From this the court concludes that if the appeal is

procedurally properly and timely brought, the court should not find that it was brought solely for the purposes of delay unless it concludes that the appeal is objectively baseless. On the record currently before the court, where many appellate issues are listed but not fleshed out, and where the matter was heard as a bench trial, the court cannot find that the appeal was brought only for the purposes of delay.

Similarly, the court believes that it should not conclude that the administration of justice requires termination of the appellate stay unless it concludes that the appeal is objectively baseless or that justice cannot be served unless the stay is terminated. These conclusions should be reached only in extraordinary cases, and a court should be extremely cautious in reaching them in a bench trial. On the record before it, the court does not believe that it should reach these conclusions.

CONCLUSION:

Given all of the foregoing, this court does not believe that it is appropriate for it to order a termination of the appellate stay. Here, this court sat in judgment, heard the evidence, determined the facts and pronounced judgment. Given the foregoing, this court is extremely cautious in further determining that the defendants have little likelihood of success on appeal, particularly when the appellate issues are not fleshed out. Although this court firmly believes that its factual findings are correct and its judgments just, it is also humble enough to allow the defendants their ability to appeal the court's decisions, without effectively mooted that appeal. On the record

currently before it, this court cannot conclude that the appeal was taken solely for purposes of delay or that the administration of justice requires this court to terminate the appellate stay. The court concludes the foregoing without prejudice to the plaintiff to re-new this motion when it can make substantive arguments concerning the defendants appeal issues as opposed to the sweeping, non-specific, theoretical arguments made in this motion.

BOND:

Although the court has concluded that it should not terminate the appellate stay, it firmly believes that the trial was conducted appropriately, that its factual findings are accurate, its legal conclusions are correct and its judgment is just. The court also finds that the delay in the plaintiff's re-possession of its property will likely have serious consequences to the plaintiff. These serious consequences exceed the use and occupancy payments and will arise as a result of the appeal period.

The defendants have filed a motion for use and occupancy payments in lieu of bond. The underlying issue here involves a commercial tenancy. As such use and occupancy payments in lieu of bond are not appropriate. Connecticut General Statutes Section 47a-35a(b) applies in commercial tenancies and authorizes the court to set a bond in cases such as this. The court concludes that an appeal bond is appropriate in this matter. Further, the court concludes that the damages that will likely be suffered by the plaintiff as a result of the appeal period will be significant and will exceed and be broader than the use and occupancy payments.

Here the defendants occupy only a small portion of the property. The defendants' continued occupation of their small portion of the property is interfering with the plaintiff efforts to re-develop the entire property. The property is a run-down old manufacturing plant with significant environmental issues. The plaintiff purchased the property in 2018 with the intent of developing low income housing units. The property needs significant environmental remediation and structural rebuilding. The re-development project will cost approximately \$38 million. The project is on a tight schedule. The plaintiff has raised the funds through a complex combination of government grants, government loans and commercial loans. Much of the plaintiff's financing is in jeopardy of loss as a result of the defendants' continued occupancy of the premises. Further, the project itself is in jeopardy as a result of the defendants' continued occupancy of the premises. Without a bond there is no reasonable assurance that the defendants can make good on the damages. Given the foregoing factual findings, the court concludes that an appeal bond is absolutely necessary to protect the plaintiff from damages that will arise because of the appeal period.

Based upon the evidence entered at the hearing, the court finds that the plaintiff's carrying costs for the property are at least as follows:

Interest on the purchase note of \$1,250,000 at 7.5% - \$7,812.50/mo

Interest on revolving note drawn to \$900,000 at 5% - \$3,750.00/mo

Insurance (liability, casualty and other) - 3,666.67/mo

Trailer on site - \$1,330/mo

Personnel costs associated with the site	- \$30,000/mo
Security	- \$5,000/mo
Taxes	- \$4,750/mo
Utilities	- \$1,300/mo
Maintenance	- \$3,000/mo

Rental value of the premises occupied by defendant - \$8,500/mo

The foregoing totals more than \$69,000 per month. The foregoing list of carry costs is non-inclusive, and the court accepted the plaintiff's testimony that the carry costs are about \$100,000 per month in total. The plaintiff's manager, Mr. Blevins, testified that the carry cost for the property was approximately \$100,000 per month and the court credits that testimony. In addition to the foregoing, the court finds that the plaintiff has expended approximately \$5 million in acquiring and remediating the property to date. Much of the foregoing investment is at risk if the project falls through, and there is a real risk that the project may fall through as a result of the appellate period and the delays caused thereby. Lastly, Mr. Blevins testified that if the project falls through, the plaintiff will likely default on its purchase note of \$1,250,000, and the property, which is secured by a mortgage, would be foreclosed upon. The court credited this testimony.

This court has entered judgment for the plaintiff and execution would have issued on March 31, 2019 had it not been for the defendants' appeal. The appeal period will delay and endanger the redevelopment of the site, costing the plaintiff its carrying cost for the property and endangering the plaintiff's investment. The appeal period, and the defendants' continued

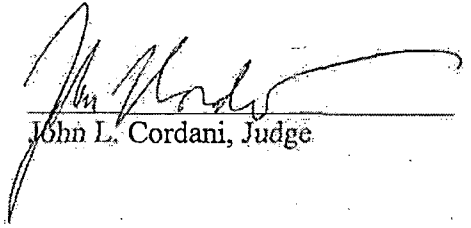
occupancy of the premises, will stall the development of the entire site, extending the period of carry costs and endangering the entire project. The defendants must therefore post an appeal bond insuring the foregoing damages. The court finds that an appeal bond in the amount of \$2.45 million¹ is appropriate.

¹ This consists of \$1.2 million in carry costs for 18 months and \$1.25 million in investment that is at likely risk. Although the court believed the general testimony that the carry costs were \$100,000 per month, it used the more conservative figure of \$69,000 per month. The court also accepted that the plaintiff had spent \$5 million to date in acquiring and remediating the property and believes that nearly all of that investment is at risk, but used the more conservative figure of \$1.25 million at risk.

ORDER:

This court respectfully denies the plaintiff's motion to terminate the automatic appellate stay without prejudice to the plaintiff to renew this motion as noted herein.

The defendants shall post a cash or surety appeal bond in the amount of \$2,450,000 no later than the end of the day on April 1, 2019.


John L. Cordani, Judge

*Memorandum of decision mailed to counsel
of record:*

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On this the 25th day of March 2019

*William C. Pett
Chief Clerk for Housing matters*